







court for the District of Idaho, for the reasons and in the particulars hereinafter set out.

## II.

The court erred in holding valid the sale to Eugene R. Day by Mathilda Cardoner of her 1-16 interest in the Hercules Mining Company's properties, for the reasons:

(a) That at said time the said Eugene R. Day was the administrator of the estate of Damian Cardoner, deceased, and said property was the part of said estate, although distributed at said time to said Mathilde Cardoner.

(b) The statutes of Idaho (Section 5543) provide substantially that no administrator must, directly or indirectly, purchase any property of the estate he represents, and that he must not be interested in any sale of said property.

(c) That such sale was apposed to positive law of the state of Idaho and therefore void.

## III

This Court concludes, as matters of law and fact:

“On the other hand, a court of equity in considering the evidence will not weigh with great nicety at what precise time Mr. Day was legally absolved of obligation to his trust as administrator, but will carefully weigh the case as one where the conduct of Day and Allen and all the circumstances of their dealings with each other and with Mrs. Cardoner must be subjected to the closest scrutiny, and upon the principle that Day held a fiduciary relationship and that unless

he has shown that he dealt with Mrs. Cardoner with entire fairness and absolute candor and with scrupulous integrity, the sale will be annulled. Day has been administrator of the estate of Mr. Cardoner and was a partner in the mines here involved, well knew the mining properties and was able to judge of their probabilities. He knew that Mrs. Cardoner trusted him as administrator and that naturally she would seek information as to the condition of affairs from him. He knew practically all that could be known about the mines as a partner, by reason of having just theretofore had charge as administrator, he was bound by every rule of honor to give her all the knowledge he possessed, and not to conceal or omit to make full disclosure.”

#### IV.

The duty of Eugene R. Ray, based upon the findings of fact and conclusions of law, stated in Paragraph 2 of this motion, was not complied with in the following respects:

(a) He did not give to Mathilda Cardoner, as “he was bound by every rule of honor to give her”, all the knowledge he possessed with reference to the properties of the Hercules Mining Company, a 1-16 interest of which he bought from her, which is the subject of this suit, and omitted to make a full disclosure as to such knowledge the court found he possessed, as stated in Paragraph 2 of this Motion.

(b) He failed to pay a fair price, or what was ap-

proximately near a fair price, for said property which he bought from her.

V

The court has found that Eugene R. Day:

“Had been administrator of the estate of Mr. Cardoner and was partner in the mines here involved, and well knew the mining properties, and was able to judge of their probabilities” \* \* \* \* “He knew practically all that could be known about the mines.”

and so knowing has not shown that he disclosed to said Mathilde Cardoner the following facts necessary for her to determine the value of the mine prior to purchase.

(a) From the date of the beginning of the negotiations for the purchase of the mine, to-wit: October 20th, 1916, until the date of sale, to-wit: October 28th, 1916, he never saw Mathilde Cardiner nor did he make any disclosures to her of any character, with reference to said mines, and property.

(b) The evidence discloses that Eugene R. Day never discussed with Mathilde Cardoner the value of said mine, or gave to her any information with reference thereto, of any character, with a view of purchasing her interest therein.

(c) The evidence fails to disclose that Mathilde Cardoner was given the following facts, which was necessary to have been known before any person could have determined with any degree of accuracy the value of her interest in said mine, and which information was in the possession of Eugene R. Day, to-wit:

1. That the net profits of the mine todate of purchase

had been \$13,607,948.54, made up of the following items:

Net profits shown by books	\$11,915,886.74
----------------------------	-----------------

(Record Page 72.)

Ore in transit	1,048,664.14
----------------	--------------

(Record Page 95)

Profit on stock of the Selby Smelting &

Lead Company	272,676.66
--------------	------------

(Record Page 96)

Cash on hand, less debts	370,561.00
--------------------------	------------

2. That the great expense of purchasing protecting property, smelter, refinery mill, power, other mines, approximately a Million Dollars, taken from the income, would not have to be duplicated.

3. That equipment, service improvements, tunnels, shafts, power hoists, cars, lighting, timbering tools, etc, that cost over a million dollars, would not have to be duplicated, which would increase the percentage of profits for the future of the mine.

4. That there was a net profit of \$2,368,632.90 earned to October 28th, 1916, for that ten months (Record Page 77.)

5. That the ore remaining in the mine approximated near 1,575,600 tons, which was 48 per cent of the total volume of ore originally in the mine.

6 That there was ore shipped and not paid for, on October 28th, 1916, amounting to \$1,048,164.14, the returns from which would be received daily and all received within 90 days, which made such item practically cash in hand.

7 That at the time of such sale lead and silver were at the highest price they had been in many years.

8. That the net profits for the ten months of 1916, to-wit: \$2,368,682.90, were approximately 60 per cent of the value of Five Million Dollars placed upon the mine and its properties, less the \$1,048,864.14 of ore in transit and subsequently paid for in a few days.

9. That there had been taken from said mine 1,777,951 tons of ore, which was sold for \$21,985,472.84, gross, or \$12.37 a ton and that the net profit for the 16 years of the life of the mine had been \$7.29 per ton.

10 She was not advised of any of the following facts:

The average net profit per ton during the life of the mine was \$7.29. That the average net profit per ton from 1908 to 1915, inclusive, during which time lead and silver prices were practically stationary and the lowest was \$5.33 ton. That the average net profit per ton for 1916 was \$9.40. That the average net profit per ton for the years 1913 to 1916, inclusive, was \$7.00 per ton. That the average lead content for milling ore was 9.85 per cent. That the average lead content for 1918 was 10.88 per cent. That the average silver content for the life of the mine in ounces, was 8.60. That the average silver content for milling ore for 1916 in ounces was 8.73. That the cost of the equipment, including the smelter and refinery, and all other property except cash on hand and ore in mine, was more than Three Million Dollars, all of which was carried as assets on the books of the company.

11 That he did not give the said Mathilde Cardoner measurements of the stopes from which the ore had been extracted, nor the size of the veins at the No. 5 level, the estimated ore production during the previous life of the mine, nor the outlook for the future, nor its value upon



the market nor its content in silver and lead, without which no estimate could be made of the value of the mine. 12 That no information was given Mathilde Cardoner, except through casual conversation, because “she was coming into the property”, and all was too general, and but little of which was valuable in determining the actual value of the mine. Accepting as findings of fact, the testimony which this court has stated was testified to by Eugene R. Day (except his estimation of value) there is nothing contained therein from which any person could determine the value of the Hercules mine, or in any manner approximating its value.

## VI.

This court states in its opinion that:

“By what we have said it is very clear that the questions of the relation of the price paid by Day to the value of the interest conveyed by Mrs. Cardoner became most important. Difficult as it generally is to reconcile the different views of men experienced in mining matters in their estimates of the value of mining properties, nevertheless, it not infrequently becomes the duty of the courts to conclude from the evidence taken in the particular case whether the sum paid has true approximate relation to the value of the claim or property conveyed.” \* \* \* \* “For example, it was perfectly plain by the September, 1916 statement that the dividends paid up to October 1, 1916, amounted to \$10,379,527.72; that investments in real estate, timber lands, smelting stocks, accounts receivable, cash deposited—all set forth by items,

brought up the net income received to \$12,019,128.04; that the cash received from January 1, 1916, to October 1, for ore sales was \$2,861,304.61, which with \$11,755.34 for interest and discount made receipts of \$2,873,059.92, and that the net incomes for the period was \$1,069,052.03. The difference between \$1,804,007.92, or over \$400,000 more than the \$1,400,000 distributed in dividends and actual net profits, is shown to be due to the difference in amounts finally received on ore in transit at the beginning and close of such period.”

If, as the court finds, the figures stated are perfectly plain from the statement mentioned, then the statements furnished Mrs. Cardoner were so erroneous and so failed to state the facts as to be misleading in the following particulars:

There should be added to the more than Twelve Million Dollars net income, found by this court, the ore in transit, amounted to more than One Million Dollars, making the net income to date over Thirteen Million Dollars.

The ore sales to October 28th, 1916 during that year, instead of being \$2,861,304.61, as shown by the court's findings, were actually \$3,690,703.74. (Record Page 77)

That the operating expense for said time, instead of being \$1,804,007.92, as the court found, from said statement, was in fact \$1,332,020.84. (Record Page 77.)

That the net income for the period of from January 1st to October 28th, 1916, was not \$1,069,052.03, as the court found was plainly shown by the September, 1916 statement, but was in fact more than \$1,250,000.00 more

than this sum, to-wit: \$2,368,682.90. (Record Page 77)

The court's findings that it was plainly shown the difference of \$400,000.00 paid in dividends above the earnings was the difference in amounts finally received on ore in transit at the beginning and close of such period, is erroneous in that, instead of there being an excess of \$400,000.00 above the net income, the actual net income during the said time was approximately One Million Dollars more than the distributed dividends, which were \$1,432,000.00 (Record page 96.)

That the learned writer of the opinion in this cause could not determine from said statement within a Million Dollars, round numbers, the income of the first ten months of 1916, nor was any other item named by him as being plainly ascertainable from such statement near the correct figures as to the fact referred to.

## VII

That the statements Day claimed to have made to Mrs. Cardoner, with reference to the property were largely not disclosures in the sense in which he was required to make disclosures in purchasing the property; that they consisted largely of general statements, such as: "I told her everything", "I told her all about the property", "She wanted to know every little thing, and did, too", and such general statements, such being conclusions of the witness and from which the court could not determine what, in fact, he did tell her.

## VIII

No fair disclosures, sufficient upon which to base a

judgment as to the value of the property, could have been made in the casual conversations testified to by Day; but it would have required expert assistants, book-keepers, measurements and figures, not carried in the head of Eugene R. Day, and these were never furnished, nor claimed to have been furnished, to Mrs. Cardoner.

## IX

The court erred in holding that the fact that Mrs. Cardoner asked the advice of co-partners and other persons, also seemed anxious to sell on account of family affairs, should be considered in determining this cause, for the reason that if the full and fair disclosures were not made by Eugene R. Day and if the transaction was not fair and free from the appearance of unfairness, then it should be canceled|

## X

The court erred in affirming the decree of the lower court because the price paid by the Appellee, Eugene R. Day, for Mrs. Cardoner's 1-16 interest in the Hercules Mining properties, did not approximate near to the real value thereof, and because the said Eugene R. Day did not clearly show by the testimony that the price paid by him approximated near to a fair value of said property. The following facts in evidence are sufficient to show that the mere categorical estimates made by the Day Brothers, Paulsen and Hutton, as to the value of said property, are not reliable, or at least they are sufficient to convince the court that Eugene R. Day did not clearly show that the

transaction was fair and that the price paid approximated near to the fair value.

(a) The net profits to date of sale had been \$11,915,886.74 (rec. p. 72), to which should be added \$1,048,864.14, for ore sold and payment for which was later received (Rec. p. 95), and profits of \$272,676.66 made on the stock of the Selby Smelting and Lead Company (rec. p. 96); cash on hand \$370,561; making a total net profit of \$13,607,948.54, on October 28, 1916.

(b) That the great expense of purchasing protecting property, smelter, refinery, mill, power, other mines, approrimating a million dollars (see page 58 of our original brief) would not have to be duplicated.

(c) That equipment, surface improvements, tunnels, shafts, power hoists, cars, lighting, timbering, tools, etc, that cost over a million dolars would not have to be duplicated, which would increase the percentage of profits for the future of the mine.

(d) There was a net profit of \$2,368,682.90 earned to October 28, 1916, for that ten months. (rec. p. 77)

(e) That the ore taken out during November and December, 1916, was approximately 23 per cent of the amount taken out in the previous 10 months, which would make the net profits for 1916 approximately \$3,000,000.

(f) The testimony shows that the year of 1917 was a more remunerative year than 1916, hence must have netted more than \$3,000,000. (Rec. p. 854.)

(g) The net income for 1917, \$3,000,000 or more, added to that for November and December, 1916, which was approximately \$550,000, equalled about the value placed on the mine; or, in other words, the Days had their

money back within about 14 months after the purchase; the sale value being \$5,000,000, less ore in transit valued at \$1,048,864.14, of \$3,950,135.85.

(h) Up to October 28, 1916 during the previous life of the Hercules, there had been mined 1,777,951 tons of ore, which was sold for \$21,985,472.84 (including the \$1,048,864.14, ore in transit), the gross average price per ton being \$12.37.

(i) The estimated contents of the mine on October 28, 1916, as made by the defendants' expert witness, Burbridge, was 1,575,600 wet tons of crude ore, or equal to 48 per cent of the mine, and at the same average value of the previous 16 years would bring \$19,490,172.00.

(j) There was ore shipped and not paid for (equal to cash) in 1916, to October 28, of \$1,048,864.14. (Rec. p. 95)

(k) At the time of sale, metals were at the highest with no immediate prospect of lower prices, the average price of lead in 1916 was \$6.83 and silver 65.66 cents.

(l) The net profit for 1916 was 73¼ per cent of the value placed on the mine and all Hercules property, excepting only the cash on hand and ore in transit, sold and equivalent to cash.

(m) There was property, equipment and new improvements of a greater value than \$2,000,000 paid for out of profits that would not have to be duplicated.

(n) Net profits for the future would be very much greater proportionately because large expenditures would not have to be duplicated, and the mine was completely equipped—"One of the best equipped mines in the Couer d'Allene".

(o) The average mineral content of milling ore in 1916 was greater than for the previous life of the mine. That is, the lead content was 10.88 per cent and average was 9.85 per cent for 16 years. The average silver content was 8.73 ounces per ton for 1916, and that of the previous 16 years was 8.60 ounces per ton.

(p) Excluding the high grade ore mined and especially picked during the first five years, the ore has not become baser to a material extent, as claimed by appellees.

(q) The average tonnage per vertical foot to October 28, 1916, was 808. At that date the tonnage per vertical foot was estimated at 1400.

(r) The value placed upon the mine was \$5,000,000. If from this is taken \$1,048,864.14 ore in transit, for which money was received within a short time, the actual value made upon the mining properties was only \$3,951,131.86, and at the time such sale was made, the mine was paying 75 per cent of this in net earnings per annum and according to the testimony of the appellee's expert, Burbridge, there was ore sufficient to last ten years.

(s) The company owned mining property, cash on hand and ore in transit to the amount of \$3,433,917.00, almost as much as the value placed upon the mine and all the property.

(t) Assuming the estimate of appellee's witness, Burbridge, to be correct—that there was remaining in the mint 1,575,600 tons of ore and that the average net profit per ton for the next 16 years would equal that of the past 16, to-wit: \$7.29 per ton—the value of the mine and allowing discounts according to Burbridge's theory, including incidental property, cash on hand and ore in

transit, would be \$11,861,052.00; or, taking the same estimate and valuing the net profits at \$5.33 per ton, being the average value of the ore sold during the times of lowest and almost level prices—from 1908 to 1915, inclusive—the value of the property would be \$9,696,052; or, taking the net value of the ore to be the lowest price obtained, to-wit: about \$3.00, net, per ton, the value of the property would be approximately \$8,000,000.

(u) The estimated depth of the ore, from the Hummingbird tunnel of No. 5 level, is 1900 feet, and the time within which it will take to remove it, is 9 4-10 years.

(v) During 1913, 1914 and 1915, lead was at the lowest average price and during the same time silver was at its lowest price for the 16 years in which the mine had been operated, but during said time the mining facilities had been bettered so that the average net profit, notwithstanding the low, level prices, was \$7.00 per ton, and based upon this value, the mine was worth \$11,067,039.00, allowing for discounts upon Burbridge's theory.

## XI.

It appearing that all of the facts set out in Paragraph 10 were taken from the testimony of the defendants or deducted therefrom, it was error for the court to hold that appellees had clearly shown that the mine and properties in question (at that time paying a net profit of approximately \$3,000,000 per year, or nearly 75 per cent of the estimated value; that the life of the mine was estimated by defendants at 9 4-10 years) were not worth more than \$5,000,000 when there was about \$1,050,000.00 ore in



transit which had been sold and cash collected therefor within a few days.

XII.

It is respectfully submitted that a new hearing should be granted.

Etienne de P. Bejeie

Carlsbad, New Mexico

Charles R. Brice

Roswell, New Mexico

Solicitors for the Appellant

STATE OF NEW MEXICO,  
COUNTY OF CHAVES

I, Charles R. Brice, one of the solicitors for the appellant in the foregoing entitled and numbered cause, have prepared this Motion for Rehearing, and I certify that in my judgment it is well founded and that it is not interposed for delay.

Charles R. Brice

Solicitor for Appellant

